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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

—vs.—

WILLIAM GOUVEIA, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION, *AMICUS CURIAE***

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INTEREST OF AMICUS

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose members include the great majority of public defender offices, coordinated assigned counsel systems and legal services agencies in the nation. The organization also includes two thousand individual members, most of whom are private practitioners.

NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional right to effective assistance of counsel in criminal prosecutions. Consistent with this interest, NLADA believes that indigent prisoners are entitled to the assistance of appointed counsel when they are detained and segregated from the prison population in anticipation of a prosecution for a crime that occurred in the institution. This brief is filed in support of the respondents.

ARGUMENT

THE LAWFULLY INCARCERATED PRISONER WHO, BEFORE FORMALLY BEING CHARGED, IS ISOLATED IN ADMINISTRATIVE DETENTION PENDING INVESTIGATION AND TRIAL FOR A CRIME COMMITTED IN THE PENAL INSTITUTION IS CONSTITUTIONALLY ENTITLED TO THE ASSISTANCE OF APPOINTED COUNSEL WHEN THE PROLONGED NATURE OF THAT DETENTION THREATENS THE BALANCE IN THE ADVERSARIAL PROCESS BY IMPAIRING THE ACCUSED'S ABILITY TO PREPARE A DEFENSE.

A. Introduction And Summary Of Argument

The right to representation by counsel "is of the essence of justice." Kent v. United States, 383 U.S. 451, 561 (1966). The laudable role of jurisprudence is to ascertain the principles upon which the foregoing rule is based and to study the manner in which new or doubtful cases should be governed by it. This constant process of reexamining established rules of law in the context of varying factual situations promotes a

refinement in the law that would be wholly lacking otherwise.

Thus mindful of the fundamental nature of the right to counsel, the instant case provides the first opportunity for this Court to consider that Sixth Amendment guarantee under circumstances unique to prison crime prosecutions. While the analysis must track the path of this Court's prior decisions affecting the scope and application of the Sixth Amendment right to counsel, guidance on this frontier of constitutional interpretation also must be drawn from a sensitive scrutiny of the realities of the prison environment. A principled examination of both precedent and policy confirms that the detained prisoner's right to appointed counsel prior to formal indictment for a prison crime must be accommodated if the historical spirit of the Sixth Amendment

is to be realized in this unique setting.

As a society whose mission is to punish, discipline and segregate its members from the law-abiding community at large, the prison environment necessarily reflects significantly less regard for the many liberties that citizens outside prison walls enjoy. Price v. Johnson, 334 U.S. 266, 285 (1948). The governed populace of the prison society are subject to intrusions on personal freedom and privacy that are plainly abhorrent to those not burdened by the disabilities of a criminal conviction and incarceration. Though lawfully deprived of liberty, prisoners retain a residuum of constitutional rights. "[H]is rights may be diminished by the needs and exigencies of the institutional environment, [but] a prisoner is not wholly stripped of constitutional protections when he is

imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555 (1974). Constitutional guarantees in the prison context inevitably are affected "by the nature of the regime to which [prisoners] have been lawfully committed." Id. at 556. And if certain of those guarantees are to endure at all in that hostile context, the required accommodation may have to be in the form of acute augmentation of the right rather than contraction of it. The goal, however, is "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Id. at 556.

Just as free society is plagued by crime, the prison community is victimized by that same societal evil. While the residents of the penal institution

are convicted criminals themselves, they are no less entitled to protection from the criminal activity of their colleagues than are free citizens. Moreover, prison administrators have a compelling interest in maintaining good order in a close physical confinement among residents who already are prone to violence or lawlessness of one kind or another. Hewitt v. Helms, ___ U.S. ___, 74 L.Ed.2d 675, 689 (1983).

But in the investigation and prosecution of prison crime, the government wields a degree of power to control and shape the course of events that is not duplicated in the sphere of law enforcement outside of prison walls. Of course, once the trial of the prisoner-defendant has commenced, proceedings against him inside the courtroom can be expected to conform to all of the standard constitutional norms that

govern any criminal prosecution. The danger, however, is that by exercising its nearly autonomous control over the prisoner-defendant's liberty interests prior to commencement of the formal proceedings, the government is effectively able to thwart certain of the accused's constitutional rights as it marshals its already superior litigational resources to prepare for that prisoner's prosecution.

The Sixth Amendment right to counsel applies to the prosecution of prison crime just as to any other criminal prosecution. United States v. Clardy, 540 F.2d 439 (9th Cir), cert. denied, 429 U.S. 963, (1976). Yet the government is in a position to exploit all of the advantages of detaining and isolating an uncounseled prisoner whose formal prosecution for an institutional crime is imminent but delayed as a

matter of unchecked prosecutorial discretion. There can be no doubt that the risk of tainted fact-finding and erroneous deprivation increases as the realistic opportunity for the accused prisoner to mount a defense is restricted by prolonged administrative detention. Consequently, the prisoner who, before formally being charged, is isolated in administrative detention pending investigation and trial for a crime committed in the institution is constitutionally entitled to the assistance of appointed counsel when the prolonged nature of that detention threatens the delicate balance in the adversarial process by impairing the accused's ability to prepare a defense.

B. The Decision Below

To view the court of appeals'

decision in United States v. Gouveia, 704 F.2d 1116 (9th Cir. 1983) as nothing more than a condemnable, radical departure from the vested and durable history of the Sixth Amendment right to counsel is to suffocate the revered notion of a living Constitution. For before the court in United States v. Gouveia were circumstances calling for application of a constitutional right in a context never before encountered. The causes of justice and constitutional integrity would have been poorly served by the court of appeals' thoughtless application of constitutional doctrine, spawned in other arenas, to a set of facts suggesting compelling but heretofore unencountered concerns.

The opinion in the instant case, however, has remained true to the rich heritage of the right to counsel even as it has recognized the need to expand

that fundamental protection "when new contexts appear presenting the same dangers that gave birth initially to the right itself." United States v. Ash, 413 U.S. 300, 311 (1973). If reviewed in a spirit cognizant of Sixth Amendment history but sensitive to adaptation as a valued constitutional corollary, the court of appeals' decision can be endorsed as a prudent yet cautious application of the right to counsel in the context of prison crime prosecutions.

Stated in summary fashion, United States v. Gouveia involves the consolidated cases of six federal prison inmates convicted of murders committed in the Federal Correctional Institution at Lompoc, California. Each of the inmates was isolated in administrative detention for periods of time ranging from eight to nearly twenty months before official criminal charges were

brought, without the benefit of appointed counsel. Though adjudicated guilty of their respective crimes in internal prison disciplinary proceedings held shortly after the crimes, the inmates were at all relevant times the objects of continuing investigation for criminal prosecution by the Federal Bureau of Investigation.

Isolated in administrative detention as the government built its cases against them, the inmates uniformly were denied access to the general prison population and the physical environs of the penitentiary. No inmate so isolated was prohibited from telephoning or having visits from an attorney of his choice, but each was shown to have lacked the financial means to hire private counsel. The arraignment of each defendant was the stage at which appointed counsel first became available

to commence preserving evidence and preparing the defense to the murder indictments returned after months of administrative detention. Ultimately, the detainees were tried, convicted and sentenced to terms of life imprisonment for the crimes at issue in each case. The issue before the circuit court of appeals was "whether the isolation of appellants in administrative detention pending investigation and trial obligated prison officials to provide counsel at any time prior to appellants' indictments." 704 F.2d at 1119.

Guiding the court of appeals throughout its analysis of the foregoing issue of first impression was the premise that the Sixth Amendment right to counsel historically was designed to assure fairness in the adversary criminal process. The court therefore determined that administrative detention

used by the government, not as a disciplinary or security measure but as a tool to isolate an inmate pending trial, is accusatory both in its purpose and its effect. In a vein clearly inspired by Kirby v. Illinois, 406 U.S. 682 (1972), the court held that the realities of the prison environment compel the conclusion that a prisoner is functionally accused for Sixth Amendment purposes sufficient to invoke the right to appointed counsel at a stage in his administrative detention prior to formal indictment. The majority reasoned that Kirby's literal suggestion of an indictment, information, arraignment, or preliminary hearing as indicia of the beginning of adversary criminal proceedings is unworkable and unrealistic in the controlled confines of the penitentiary because prisoners are "subject to the discretion of government officials

in a way that individuals outside prison are not." 704 F.2d at 1120.

To illustrate the sharp contrast with law enforcement practices in free society, the opinion of the court of appeals highlights the following unique considerations associated with the investigation and prosecution of prison crimes:

Upon arrest a defendant must be arraigned "without unnecessary delay." Fed.R.Crim.P. 5(a). At that point the accused is guaranteed the assistance of counsel. No such procedural guarantees operate in prison, where the suspect may be isolated throughout the pendency of the government's investigation.

* * *

In the instant case ... the government was able to delay appellants' arraignment for up to twenty months, thereby effectively suspending the right to counsel until its case was built ... Formal charges need not be brought until the government is ready for trial because the suspect

can be isolated without being arrested.

704 F.2d at 1122.

Of substantial concern to the court of appeals was the adverse effect upon the accused's right to a fair trial flowing from government exploitation of its investigatory advantage, while the isolated and uncounseled inmate is left virtually helpless to take steps necessary to preserve his own defense.

Worthy of particular note, however, is the painstaking manner in which the court of appeals heeded the mandate of this Court to find a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Wolff v. McDonnell, 418 U.S. at 556. A wooden approach to the sensitive interests at stake for prison administrators and inmates undoubtedly

would have produced an unsatisfactory resolution. But the court of appeals carefully refrained from exalting the accused's right to counsel over the legitimate security and administrative concerns of the institution, holding instead that the right to counsel attaches only at a point in the term of the prisoner's administrative detention at which appointed counsel is necessary to assure that the accused will receive effective assistance of counsel at the trial itself. United States v. Gouveia, 704 F.2d at 1124. Thus, the court unequivocally stated that appointment of counsel is not mandated at the earliest stages of the investigation of prison crime before the adverse positions of government and inmate have solidified. Similarly, counsel still is not the right of an inmate who is subject to internal disciplinary proceedings for

conduct which may also be a crime. See, Wolff v. McDonnell, 418 U.S. at 570.

Proceeding, therefore, on the sound principles that the longer an inmate is isolated following the commission of a crime the more the detention takes the form of an accusation, and that counsel can ameliorate the adverse consequences of detention if the appointment comes within a reasonable time of its commencement, the court of appeals concluded as follows:

... [A] prisoner, who is being held in isolation because of an impending investigation and indictment related to a serious crime, must be provided counsel, subject to the same conditions as are applicable to an indigent following indictment, after a reasonable time. If counsel is not so provided [the detained inmate] must be released into the general prison population.

704 F.2d at 1124.

The remedy of release from detention as an alternative to appointment of

counsel is further evidence of the court of appeals' profound sensitivity to the need to strike an appropriate balance between competing interests of adversaries. Thus, the government is at all times free to choose between releasing the detainee into the prison population or appointing counsel while continuing the accused's administrative isolation.

Although its decision had breathed life into a constitutional guarantee that previously had no real meaning in the prison context, the court of appeals' ruling stems not from obtuse theory but from lawfully promulgated prison regulations to provide specificity to the constitutional right to counsel and to establish an appropriate measure for the "reasonable time" standard by which the right is guided. Those prison regulations, the majority astutely observed, "create a condition of confinement that

embodies an accusation which generates a Sixth Amendment right to the assistance of counsel." Id. at 1124.

Specifically, prison regulations mandate that the maximum stay in isolation for purposes of discipline is ninety days. So when that ninety day period is exceeded, objective criteria exists from which to infer that the detention is for a purpose other than discipline. While the rule fashioned by the court of appeals allows the government to refute an inmate's claim that his continued detention is due to a pending investigation or trial for a criminal act, the lapse of ninety days is the measure of a "reasonable time" after which counsel presumptively is necessary to assure that the accused's right to a fair trial is preserved.

If the government elects to provide the detained inmate with counsel, the

objective is realized because a legally trained advocate will assume responsibility for preparing and preserving a defense to the impending criminal charges even though the accused remains in isolation indefinitely. But the same end of preserving the right to a fair trial is served if, at the government's option, the inmate is released from detention to pursue his own orderly investigation of the alleged crime and his potential defenses prior to formal indictment.

To be sure, the defendant's right to a fair trial free from the taint of all overreaching is still at risk even in this scheme because the investigatory handicap that is the underlying evil may well attach prior to the passage of his ninety days in isolation. The elimination of all such risk, the majority in Gouveia recognized, is not possible

except in a vacuum. But as a decision cognizant of fiercely competing yet equally compelling interests, United States v. Gouveia is exemplary in its achievement of a proper balance consistent with the ends of justice as well as orderly prison administration.

C. United States v. Gouveia:
A Silhouette Of Sixth Amendment
Precedent And Policy

If nothing more than companionship and facilitation for the criminally accused were deemed the values of attorney representation, the Sixth Amendment's assurance that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence" would be an empty platitude. In a system of adversary judicial proceedings, however,

counsel's role is not akin to a mission of mercy. An advocate trained in the science of law, counsel functions "to remove disabilities of the accused" United States v. Ash, 413 U.S. 300, 312 (1973), and to minimize the "danger of conviction because [the defendant] does not know how to establish his innocence." Gideon v. Wainwright, 372 U.S. 335, 345 (1963). But beyond the individual interests of the defendant in avoiding an unjust conviction, the presence of counsel for the accused serves the greater public interest of guarding the integrity of the fact-finding process and enhancing the fairness of the adversary system of justice. United States v. Wade, 388 U.S. 218 (1967).

Against this background, an analytical framework has surfaced from the decisions of this Court that serves as a guide for resolving Sixth Amendment

right to counsel issues. By its own terms the Sixth Amendment refers to rights in connection with criminal prosecutions, yet the decisions of this Court confirm that a defendant is entitled to the assistance of counsel not only at trial, but "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. at 226. Accord, Coleman v. Alabama, 399 U.S. 1 (1970); Gilbert v. California, 388 U.S. 263 (1967).

Regarding the requirement that there be a "prosecution", this Court has held that the right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against an accused because that event marks the point at which the adverse positions of government and defendant

have solidified. Kirby v. Illinois, 406 U.S. 682, 688, 689 (1972). Beyond that, however, the determination must be made as to whether a specific pretrial event is a critical stage requiring the presence of counsel "to preserve the defendant's ... right meaningful to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." United States v. Wade, 388 U.S. at 227.

One need not assail the wisdom or logic of the two-stage analysis outlined above to recognize that the Sixth Amendment right to counsel as it arises in the context of a prison crime prosecution is peculiar and therefore ill suited to an analysis born of other considerations. Thus, Kirby's effort to declare by reference to traditional procedural events the precise point at which adversarial proceedings begin

against a free citizen does not pretend to address the alternative methods by which the prosecutorial forces of the government may be focused on a prisoner suspected of a crime. Consider that, with respect to the Fifth Amendment privilege against self-incrimination, this Court implicitly acknowledged that the mechanism for safeguarding certain constitutional rights of persons lawfully incarcerated must be tailored to the realities of the prison environment if there is to be any protection at all. Mathis v. United States, 391 U.S. 1 (1968). Mathis held that a prisoner is in custody for purposes of the Fifth Amendment notwithstanding the argument that the continuous nature of the prisoner's lawful incarceration mandates that there be more of a physical restriction than mere confinement with the general prison population. Mathis v.

United States, 391 U.S. 1, 7 (White, J., dissenting). Similarly, the protections of the Sixth Amendment right to counsel can endure in the prison context only if the inquiry is freed of certain analytical constraints that obscure what is actually at stake.

An assumption of the standard Sixth Amendment analysis that looks first for evidence that adversary judicial proceedings have been initiated and second for an indication that the event in question is a critical stage requiring the assistance of counsel is that no one not formally accused will be prejudiced by the absence of an attorney's assistance while the government investigates the crime. See, Kirby v. Illinois, 406 U.S. 682, 690. The theory is that a person not yet charged with a crime needs no help in coping with legal problems or assistance in meeting his

professional adversary because he has no adversary.

Indeed, in the investigatory stage the government does not behave as an adversary of the citizen who is simply a suspect; the citizen remains free to conduct his affairs without interference or government restraint of any kind. Until such time as the government commits itself to prosecute and confronts an accused with the prosecutorial forces of an organized society, counsel is presumed to be unnecessary. Moore v. Illinois, 434 U.S. 220 (1977). Moreover, the suspect is not in a position to accelerate the point at which the right to counsel will attach because, "Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause [for an arrest] ..."

Hoffa v. United States, 385 U.S. 293, 310 (1966).

For prison crime prosecutions, however, those assumptions dissolve and the analysis produces an undesirable anomaly. Granted that the prisoner-suspect is in no better position than a free citizen under Hoffa to force the government's hand for the purpose of invoking the Sixth Amendment right to counsel, but the government need not behave benignly towards the prisoner-suspect as it must towards the citizen-suspect. On the contrary, the government can assume the role of an adversary vis-a-vis the prisoner without its adversarial practices having to conform to the constitutional limitations that control when that role is formalized by the initiation of a charge. Segregation of the prisoner in administrative detention while the government builds

its case is the vivid illustration from the case at bar that the government functionally accuses in the prison context, and then exploits that advantage, without having to accuse in fact. The resulting anomaly is that, while the predicate of an adversary judicial criminal proceeding has not been satisfied when the prisoner-accused is detained indefinitely prior to being charged, that interim period during which the accused is helpless to take steps to preserve his defense takes on all of the characteristics of a "critical stage" requiring the assistance of counsel.

Thus, a pretrial event is critical and requires the provision of counsel if it threatens to prejudice the defendant's rights and if the assistance of an attorney will help to avoid that prejudice. United States v. Wade, 388 U.S.

at 227. With respect to a preliminary hearing at which probable cause for charging the accused with an offense is determined, this Court held in Coleman v. Alabama, 399 U.S. 1 (1970) that the potential prejudice to the defendant is that the hearing may be the vehicle for an erroneous or improper prosecution. Though counsel may or may not succeed in exposing fatal weaknesses in the government's case that cause the magistrate to refuse to bind the accused over, counsel's participation in that proceeding nevertheless was recognized as essential to preserve testimony favorable to the accused of a witness who does not appear at trial and to discover the case against the defendant in order to prepare the appropriate defense.

In much the same way, the prisoner isolated in administrative detention is prejudiced because, though not yet

charged, the occasion of his detention can be exploited to facilitate an improper prosecution. More importantly, isolation without the aid of legal counsel deprives the accused of the opportunity to realize the investigatory advantages of a lawyer's assistance that would compensate for his own inability to probe. And the potential benefit of "what a prompt and thorough-going investigation might disclose as to the facts" should never be underestimated. Powell v. Alabama, 287 U.S. 45, 58 (1932).

There is an additional consideration that is even more notable in regard to the critical characteristic of the prisoner-accused's indeterminate detention pending the formal charge for a prison crime. As this Court traced the historical expansion of the Sixth Amendment right to counsel in United

States v. Ash, 413 U.S. 300 (1973), it noted that the expansion has come when circumstances require counsel's participation in a pretrial event to remove disabilities of the accused in the same fashion that counsel compensates for the disabilities of the layman at trial. Ash held that the right to counsel does not extend to the prosecution's trial-preparation interviews with witnesses because, "The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself." Id. at 318. Equality of access was cited in Ash as a valuable force that removes "any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee." Id. at 319.

But without that equality of access so important to maintaining an appropriate balance in the adversarial process, an accused is overpowered by his professional adversary at every step taken in preparation for trial including those that are not strictly confrontational. The obvious disability of an isolated prisoner who is detained because he is about to be charged with a crime is that, without attorney assistance, he has no access to the evidence that would be his defense at a time when prompt action to discover and preserve it is essential.

If the right to counsel is to endure meaningfully in the context of a prison crime prosecution, therefore, the search for an accommodation need not deviate significantly from the historical interpretation of the Sixth Amendment. What is necessary, though, is to

recognize that the detention of a prisoner because he is to be charged with a crime is logically and conceptually akin to the commencement of formal adversarial criminal proceedings against a person whose liberty is not already abridged by incarceration. And because the events that transpire during the interim period of detention "might well settle the accused's fate and reduce the trial itself to a mere formality", United States v. Wade, 388 U.S. at 224, these new circumstances justify an expansion of the right to counsel to counteract the same dangers that gave birth initially to the right itself. To adhere to a rule authorizing appointment of counsel only at or after the time that the criminal accusation against the isolated prisoner is formalized will "convert the appointment of counsel into a sham and nothing more

than a formal compliance with the constitution's requirement that an accused be given the assistance of counsel." Avery v. Alabama, 308 U.S. 444, 446 (1939).

D. The Remedy

When a violation of the Sixth Amendment right to counsel has been established, its effect must be identified and purged to make certain that the defendant has been effectively represented and not unfairly convicted. United States v. Morrison, 449 U.S. 361 (1981). In the instant case, the court of appeals found such a violation and held that its effect was to undermine irreparably the critical ability of the defendants to preserve their defenses at the early stages of the investigation. Tailoring the remedy to an injury found

to be immune from an after-the-fact cure, the court of appeals ruled that the only certain remedy was to dismiss the indictments.

While the court opined that prejudice to the defendants' ability to defend against the charges could be presumed from the undisputed fact of their lengthy administrative detention, the majority affirmed the district court findings in regard to some defendants' irrevocable loss of inmate witnesses and the deterioration of physical evidence essential to corroborate the defendants' testimony. United States v. Gouveia, 704 F.2d 1116, 1126 (1983).

As an abstract proposition, the remedy for a constitutional violation in the criminal arena need not go beyond denying the prosecution the fruits of its transgression. Justice is served when the taint of government

overreaching is neutralized so that the criminal prosecution can proceed, as nearly as possible, as if the constitutional guarantee had been respected. The exclusion of evidence obtained in violation of the Fourth Amendment is the clearest example of such a keenly focused remedy. That is not to suggest, however, that a particular constitutional violation cannot so pervasively and irreparably infect the process by which guilt or innocence will be determined that there is no realistic prospect of averting those adverse consequences if the matter goes to trial. This Court's decision in United States v. Morrison, supra, is not to the contrary.

Where, as here, the violation of the right to counsel is in the context of a pretrial event, analysis of the damage "depends upon an assessment of those factors that made the denial

error." Coleman v. Alabama, 399 U.S. 1, 18 (White, J., concurring). Thus, for the prisoner detained because he will be charged with a crime, this analysis already has observed that the right to counsel is violated because he is functionally accused and requires attorney assistance to compensate for his own inability to preserve his defense. To the extent that such a defendant makes a showing that important physical evidence or testimony of witnesses unavailable at trial could have been preserved had counsel been appointed at the appropriate time, then it is clear that the drastic remedy of dismissal of the indictment is warranted.

That defendant, however, is inherently disadvantaged in this task because he is compelled to prove that his defense has been prejudiced by the

irretrievable loss of favorable evidence, the precise substance of which cannot be determined owing to the lack of attorney assistance to preserve it. The nature of the violation in cases such as this, therefore, uniquely effects both the integrity of the conviction and the defendant's ability to document with precision how the transgression prejudiced his defense. The remedy chosen in any case involving such a Sixth Amendment violation must not be blind to this reality.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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